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In the Supreme Court of the United States

OCTOBER TERM, [redacted] 1969

JOHN J. PYNE,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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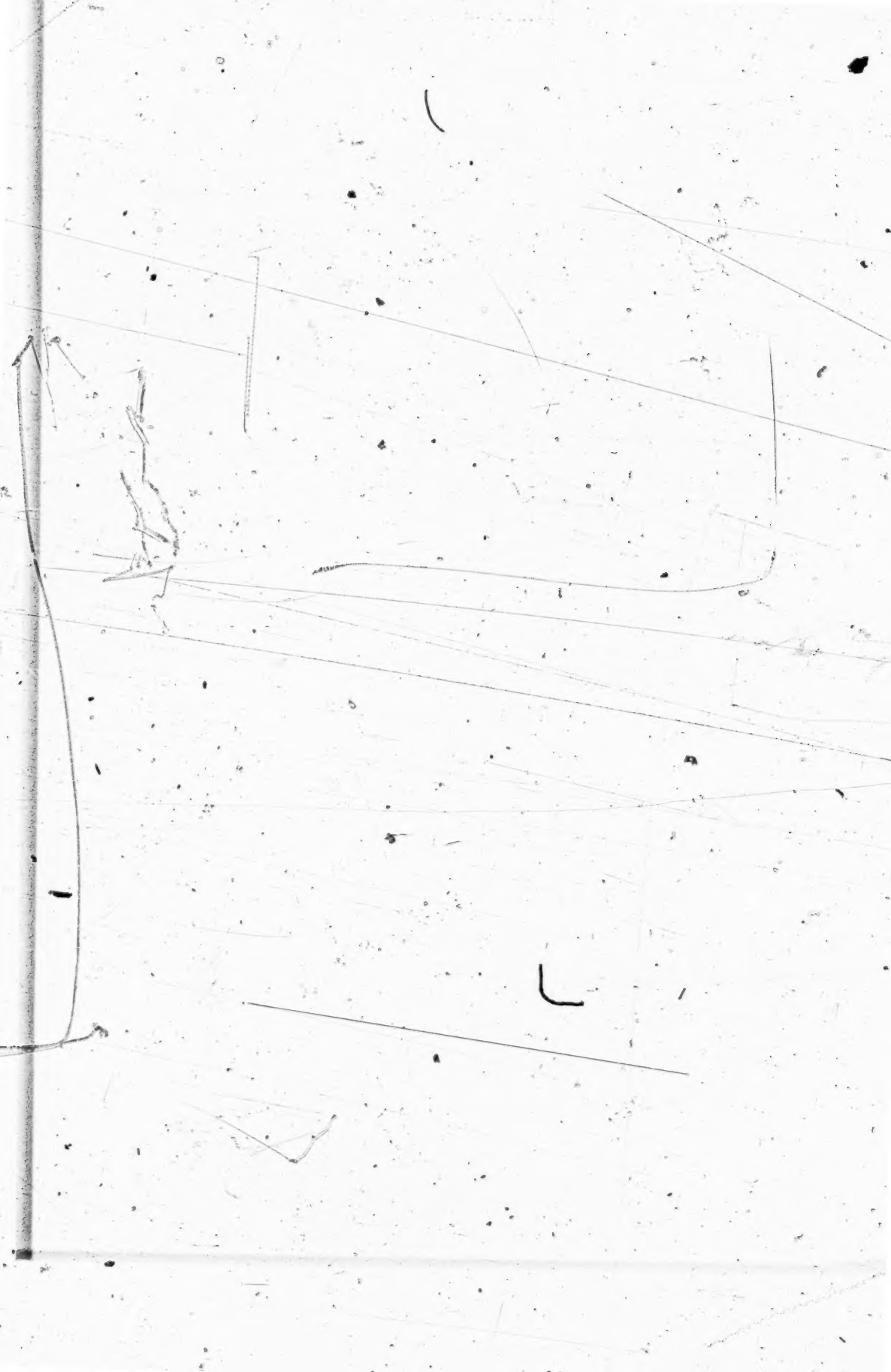
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TO: *The Honorable, The Chief Justice and Associate Justices of The Supreme Court of the United States:*

Your petitioner, John J. Pyne, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit affirming the judgment of conviction for conspiracy to violate Section 1952, Title 18, United States Code, to wit, travel in interstate commerce for the purpose of carrying on an unlawful business enterprise involving extortion, in violation of Section 371, Title 18, United States Code, in the United States District Court for the Northern District of Illinois, Eastern Division.

OPINION BELOW

The opinion of the Court of Appeals is not yet officially reported. It is printed in the Appendix to this petition. (App. A, p. App. 1)

JURISDICTION

Judgment of the Court of Appeals was entered on March 7, 1969 (App. B, p. App. 16). A timely petition for rehearing was denied on April 3, 1969. (App. C, p. App. 17). The jurisdiction of this Court is invoked under 28 U.S.C., 1254(1).

STATUTES INVOLVED

"§ 1952. Interstate and foreign travel or transportation in aid of racketeering enterprises

"(a) Whoever travels in interstate or foreign commerce or uses any facility in interstate or foreign commerce, including the mail, with intent to —

"(1) distribute the proceeds of any unlawful activity; or

"(2) commit any crime of violence to further any unlawful activity; or

"(3) otherwise promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on, of any unlawful activity,

and thereafter performs or attempts to perform any of the acts specified in subparagraphs (1), (2), and (3), shall be fined not more than $10,000 or imprisoned for not more than five years, or both.

"(b) As used in this section 'unlawful activity' means (1) any business enterprise involving gambling, liquor on which the Federal excise tax has not been paid, narcotics, or prostitution offenses in violation of the laws of the State in which they are committed or of the United States, or (2) extortion, bribery, or arson in violation of the laws of the State in which committed or of the United States. * * * "

§ 371. *Conspiracy to commit offense or to defraud United States*

If two or more persons conspire either to commit anff offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor. June 25, 1948, c. 645, 62 Stat. 701.

THE INDICTMENT

"The AUGUST 1966 GRAND JURY charges:

"1. Beginning on or about April 20, 1966, and continuously thereafter to and including May 25, 1966, the exact date being unknown to the Grand Jury, at Chicago, Illinois, in the Northern District of Illinois, Eastern Division, and elsewhere, the defendants,

JOHN M. FELLABAUM,
SHERMAN C. KAMINSKY,
JOHN J. PYNE, and
DOSS THOMAS SMITH,

and the following co-conspirator not named as a defendant herein,

ELWOOD LEE HAMMOCK,

hereinafter referred to as co-conspirator, did unlawfully, wilfully and knowingly conspire, combine, confederate and agree together with each other and with divers other persons whose names are to the Grand Jury unknown, to commit an offense against the United States to-wit, to travel and cause travel in interstate commerce, with intent to promote, manage, establish, carry on and facilitate the promotion, management, establishment and carrying on of an unlawful activity, involving extortion; in violation of the Illinois Revised Statutes of 1965, Chapter 38, Section 16-1, to-wit, 'theft;' and said defendants unlawfully, wilfully and knowingly did perform and cause to be performed acts facilitating the carrying on of said unlawful activity; in violation of Title 18, United States Code, Section 1952.

"2. It was a part of said conspiracy that John Fellabaum and Doss Thomas Smith would steal and cause to be stolen wallets, billfolds and the contents thereof, from various victims.

"3. It was a further part of the conspiracy that the co-conspirator Elwood Lee Hammock would travel from North Carolina to Chicago, Illinois, where he met with the defendant Sherman C. Kaminsky. The co-conspirator Elwood Lee Hammock and the defendant Sherman C. Kaminsky then proceeded to drive to Normal City, Illinois, to extort a victim.

"4. In furtherance of said conspiracy and in pursuance of the objects thereof, the defendants and co-conspirator performed the following:

OVERT ACTS

"1) On or about April 20, 1966, John M. Fellabaum, defendant, met Bruce T. Kaiser in Chicago, Illinois;

"2) On or about May 16, 1966, Sherman C. Kaminsky, defendant, from Chicago, Illinois, called co-conspirator Elwood Lee Hammock, in Fayetteville, North Carolina;

"3) On or about May 17, 1966, John J. Pyne, defendant, sent Seventy-five dollars ($75) from Chicago, Illinois, to co-conspirator Elwood Lee Hammock, in Lillington, North Carolina;

"4) On or about May 18, 1966, co-conspirator Elwood Lee Hammock flew from Raleigh-Durham, North Carolina, to Chicago, Illinois;

"5) On or about May 19, 1966, co-conspirator Elwood Lee Hammock, and defendants Sherman C. Kaminsky and John J. Pyne, had a telephone conversation at Chicago, Illinois;

"6) On or about May 21, 1966, Doss Thomas Smith, defendant, had a conversation with co-conspirator Elwood Lee Hammock, at the Holiday Inn, in Chicago, Illinois; all in violation of Title 18, United States Code, Section 371."

STATEMENT OF THE CASE

The petitioner, John J. Pyne, was charged in indictment No. 66 CR 534 returned on August 23, 1966. Said indictment charged John M. Fellabaum, Sherman Kaminsky, John J. Pyne and Doss Thomas Smith with a violation of Title 18, Section 371, United States Code, in that for the period between April 20, 1966 and to and including May 25, 1966, the defendants did conspire to travel and cause travel in interstate commerce with intent to promote activity involving extortion, in violation of Illinois Revised Statutes 1965, Chapter 38, Section 16-1, to wit, "theft"; and performing and causing to be performed acts facilitating the carrying on of said activity.

The defendant Kaminsky entered a plea of guilty and thereafter became and still is a fugitive. The defendant Smith entered a plea of guilty and was sentenced to a term of four years. The defendants Pyne and Fellabaum were tried by a jury before The Honorable Edwin A. Robson and were found guilty. The Court sentenced the defendant Pyne to the custody of the Attorney General for a period of five years and fine him $10,000.00 and costs, said sentence to run consecutively to a sentence of five years imposed by Judge Hubert L. Will in a similar case involving the same type of offense.

On appeal to the United States Court of Appeals for the Seventh Circuit, conviction was affirmed. The evidence in this case taken in the light most favorable to the Government is as follows:

> On April 19, 1966, Bruce Kaiser, who lived in Normal, Illinois, met defendant Fellabaum at a bar in Chicago, and shortly thereafter accompanied Fellabaum to a hotel room where Kaiser and Fellabaum engaged in a homosexual act. Fellabaum then de-

manded and got Kaiser's wallet and money. The following day Fellabaum called Hammock, the unindicted co-conspirator, who was then in New York. Hammock testified that after Fellabaum told him about the Kaiser incident, he told Fellabaum to come to New York. On April 21, Fellabaum arrived in New York, gave Hammock several cards from Kaiser's wallet, and informed Hammock that Kaiser looked like a good prospect for extortion.

Hammock then called Pyne, told him of the Kaiser affair, and advised Pyne to call Kaminsky and ask the latter to contact Hammock in Fayetteville, North Carolina, where Hammock was going. On April 23, Kaminsky called Hammock in Fayetteville and told him to come to Chicago to meet with Pyne. Hammock arrived on April 24 and called Pyne. Kaminsky, Pyne, and Hammock then discussed when they should "make a play" for Kaiser. Hammock called Fellabaum in New York, told him of his discussion with Pyne and Kaminsky, and directed him to come back to Chicago. Fellabaum agreed to do so.

On April 26, Hammock was arrested by agents of the Federal Bureau of Investigation on another charge. He was released in time to go to New York for a court appearance on May 6. On that day, he began full cooperation with the F.B.I. in the matter now before this court. No further action was taken by Hammock in the Kaiser matter without the knowledge and usually the accompaniment of the F.B.I.

Subsequent to May 6, Hammock met Kaminsky in Philadelphia and discussed doing something about Kaiser. Pursuant to this conversation, Hammock called Doss Smith on Kaminsky's instructions and told him

to mail the wallet to Fayetteville; in the meantime, Smith had obtained the wallet from Fellabaum. Kaminsky then called Hammock and instructed him to come to Chicago. Hammock and two F.B.I. agents then left for Chicago, and Hammock picked up the wallet at the post office box to which he had previously mailed it. Kaminsky told Hammock he would be ready to move the following morning on the "Normal" matter (*i.e.*, the Kaiser extortion).

The next morning, Hammock and Kaminsky drove to Pyne's house, and Kaminsky took a police badge (referred to as a "button") from Pyne's car to use in the extortion. After beginning the drive to Normal, the men concluded they would arrive at Normal too late in the day to accomplish their purposes, and Kaminsky therefore decided it would be better to wait a few days. Some discussion was then had as to whether they should continue "the Kaiser play". Apparently, however, no further effort was made to contact Kaiser prior to the time they were arrested.

QUESTIONS PRESENTED

1. Where a conspiracy contemplates local extortion and thereafter one of the co-conspirators commences cooperation with the Federal Bureau of Investigation, can his subsequent act of travel from North Carolina to Chicago, Illinois, while he was acting as an undercover Government agent, be used against his co-conspirators and indeed form the very basis upon which the Court for the Northern District of Illinois had jurisdiction under the interstate commerce clause?

2. Can a special employee acting under the aegis of the Federal Bureau of Investigation possess the *animus* necessary to a criminal breach of the interstate commerce laws so as to give Courts of the United States the element necessary to their jurisdiction over his alleged co-conspirators.

3. Where the central alleged aim of the conspiracy never existed: to wit, the travel of Hammock from North Carolina to Chicago, Illinois, until after the co-conspirator Hammock commenced active cooperation with the agents of the Federal Bureau of Investigation and became their agent and where the indictment charged that the said particular travel was the object of the conspiracy, can said act of travel from North Carolina to Chicago, Illinois by one no longer a co-conspirator be an act in furtherance of the conspiracy and the object of the conspiracy?

4. Can a person acting as an agent of the United States be a party to an agreement to commit an offense against the laws of the United States?

5. Where, contrary to cases decided by this Court, the trial court admitted a post-conspiracy statement made by a co-defendant against the petitioner Pyne on motion by the prosecutor "that the Government had shown a prima facie case of conspiracy" and which motion was granted by the trial court and where both the motion and the granting of the motion were made in the presence of the jury, did not the Court of Appeals err in holding that while it was error, it was harmless error?

REASONS FOR GRANTING THE WRIT

1. The Court should grant certiorari in order to decide whether or not a Government agent or informer acting at the direction of the Federal Bureau of Investigation can conspire to commit a crime against the Government of the United States.

2. This Court should grant certiorari to determine whether an agreement to aid and abet a government agent in the performance of his duties can be a conspiracy to commit an offense against the United States.

3. The decision of the United States Court of Appeals for the Seventh Circuit holding as harmless error the admission of a post-conspiratorial statement made by one of the defendants against the petitioner, under circumstances where the trial judge, by admitting said statement held, in the presence of the jury, that the government had proven a prima facie case of conspiracy, not only impinges upon a fact determination to be made by the jury, but is contrary to decisions of this Court in *Krulewitch* v. *United States,* 336 U.S. 440, and *Fiswick* v. *United States,* 329 U.S. 211. Petitioner did not receive a fair trial.

I.

An important question in conspiracy law is involved in this case. The one count indictment charged a conspiracy to violation Section 1952, Title 18, United States Code. The object of the conspiracy which vested jurisdiction in the United States District Court for the Northern District of Illinois, was that the petitioner and others conspired with Elwood Lee Hammock to travel from North Carolina to Chicago, Illinois.

Originally the conspirators had met in Chicago, Illinois, and had agreed to go down to Normal, Illinois, and

attempt extortion against a person by the name of Kaiser. The defendant Fellabaum had taken Kaiser's wallet in Chicago, Illinois and had given it to Hammock in New York City. (This is not the interstate commerce charged). Hammock came to Chicago from New York and met the petitioner Pyne and one Kaminsky near the O'Hare Airport in Chicago. On April 24, 1966 they agreed to go to Normal, Illinois, several days later but on April 26, 1966 Hammock was arrested and was not released until five or six days later. Hammock had a court call in New York City, and he traveled there, appeared, and the following day went to his home in Fayetteville, North Carolina. At that point on May 6th, 1966 he commenced active co-operation with agents of the Federal Bureau of Investigation. They told him to do whatever the other defendants asked him to do.

Several weeks later, he received a call from Kaminsky to come to Chicago in order to attempt the extortion in Normal, Illinois. Hammock agreed to come to Chicago. Agents of the F.B.I. accompanied him, paid for his travel, and paid for his hotel bills while he was in Chicago. The F.B.I. agents occupied a room adjoining Hammock's.

The defense of this case was that the travel by Hammock from North Carolina to Chicago, Illinois, on May 18, 1966, was made at a time when he was no longer a conspirator. He commenced co-operation with agents of the Federal Bureau of Investigation on May 6, 1966. *His agreement* to come to Chicago was made at a time when he was no longer a conspirator. In other words, the defense contended below that he could not have been a co-conspirator; he had become an agent of the Government almost two weeks prior to the act of travel which was the object of the conspiracy, was even *considered and undertaken* by the conspirators.

Hammock's agreement to travel had to be the "gravamen" of the offense. It was a one count indictment charging a conspiracy to commit the crime of travel in interstate commerce with intent to carry out an unlawful activity, to-wit: extortion.

If the defendants in this cause had agreed within the State of Illinois to extort a sum of money from an Illinois victim, there would be no federal offense under Section 371, Title 18, United States Code. This was the posture of the case at the time the conspirators were in Chicago, Illinois. What they contemplated at the meeting near the O'Hare Airport in Chicago, Illinois, was a local offense. It was almost two weeks after Hammock had commenced co-operation with agents of the F.B.I. that the further agreement to have him travel from North Carolina to Chicago, Illinois, was considered.

This Court has held in *Krulewitch* v. *United States,* 336 U.S. 440, *Fiswick* v. *United States,* 329 U.S. 211, and *Brown* v. *United States,* 150 U.S. 93 that acts done after a conspiracy has ended, or acts done by one not a co-conspirator at the time, may not be attributed to the alleged co-conspirators. The reviewing court held: (App. A p. 4).

> "If Pyne and Fellabaum had been charged with the offense of interstate travel as a substantive crime under Title 18, §1952, this question raised by the appellants would be relevant. However, the appellants err in contending that Hammock's travel was the 'gravamen' of this indictment; defendants were charged with *conspiring* to violate §1952, and interstate travel itself is not an essential element for such conspiracy."

This Court should grant certiorari in order to decide an important question of conspiracy law i.e., the extent, if any, to which a government agent can participate in a conspiracy and to which he may by his acts bind other conspirators.

II.

A conspiracy, by definition, is an agreement to commit an offense against the United States. In this instance the act to be committed was the transportation of Hammock in interstate commerce for purposes of extortion. But, as an agent of the United States, Hammock could not do that act with the intent necessary to a violation of 1952. It is clear that whatever agreement there was, it contemplated Hammock's travel in interstate commerce. But, as an agent of the United States, his travel in interstate commerce could not be an offense against the United States. Therefore, whether the other alleged co-conspirators knew it or not, their agreement was not to commit an offense against the United States. Just as there can be no guilty aider and abettor without a guilty principal, so also there can be no crime without a criminal. There can be no offense without an offender.

III.

The Court of Appeals for the Seventh Circuit found there was no error in a ruling by the trial court which permitted the jury to apply against the petitioner Pyne, a post-conspiracy statement made by Fellabaum to F.B.I. Agent Tolan concerning Fellabaum's activities in securing the victim's wallet. The Court of Appeals conceded that it was error but finds that it was harmless and did not effect the petitioner's rights under Rule 52(*a*) of the Federal Rules of Criminal Procedure. When the prosecutor moved that certain evidence which was held only against certain of the defendants now be considered

against each, the prosecutor stated, as grounds for admission, in the presence of the jury "that the Government has shown a prima facie case of conspiracy." The trial court ultimately sustained the motion and permitted the evidence to be offered, even though the post-conspiratorial admission never could have been admitted under any theory so far as this petitioner knows. The Court of Appeals, in its opinion, stated:

> "Although the court supported the government's position with regard to the application of the evidence, it does not follow that the jury would read into such a ruling a judicial approbation of the government's contention that a prima facie case had been proved."

What other conclusion could the jury have come to? The ruling clearly told the jury that the prior admission of Fellabaum to F.B.I. Agent Tolan after the conspiracy was concluded, and which originally the Court ruled not to be admitted against petitioner Pyne, was now being admitted. The petitioner contended below that it did much more than that. This ruling tells the jury that the Court agrees with the prosecutor that a prima facie case of conspiracy had been made. It was a positive statement to the jury that Fellabaum's admissions could be used against the petitioner Pyne. This was a clear invasion of the petitioner's right to have the question of fact, to-wit: the existence of a conspiracy and petitioner's participation therein, decided by a jury. This is why he asked for a jury trial. The Trial Court's ruling could not be erased by his later instruction. The instruction did not cure this and it could not be harmless error. If it is harmless error then this Court's ruling in *Fiswick* v. *United States*, 329 U.S. 211, *Krulewitch* v. *United States*, 336 U.S. 440 and *Brown* v. *United States*, 150 U.S. 93, and other authorities too numerous to mention must go down the drain.

The Court of Appeals for the Seventh Circuit also held that an additional reason for holding this error harmless was that there was substantial independent evidence of the entire operation of the conspiracy and the guilt of the petitioner and his associates. At this portion of its opinion, at page 10, the Court of Appeals relied again on Hammock's conversations with persons other than the petitioner Pyne. This again points up the contradiction in the Court's holding. If Hammock was not in fact a conspirator because of his cooperation, how then could his conversations with other defendants be held against the petitioner Pyne. Yet the Court of Appeals correctly stated the rule at page 4 of its opinion when referring to this matter. That Court stated:

> "These cases state the rule that acts done after a conspiracy is ended, or acts done by one not a co-conspirator at the time, may not be attributed to the alleged co-conspirators. See especially the Morello case at 635." (App. A, p. 4)

The Court of Appeals thus conceded the rule asserted by the petitioner to be correct. But how could the petitioner Pyne agree with Hammock who was an agent of the Government? Stated otherwise, could the petitioner have agreed with an agent of the F.B.I. to commit a crime? Obviously, the petitioner could not, not unless the agent of the F.B.I. were actually committing a crime. If the agent were acting in his official capacity, the petitioner could not agree with him to commit an offense. It was contended in the Court of Appeals that Hammock was an agent of the United States. He could not have been a conspirator, hence his conversations with persons other than the petitioner, after Hammock had ceased being a conspirator were not admissible against the petitioner.

Hence, the corroboration, which the Court of Appeals held was ample to override any error committed by the admission of Fellabaum's testimony against the petitioner Pyne, must fail.

This Court should exercise its jurisdiction in this cause in order to correct an erroneous application of this Court's decision in *Krulewitch, Fiswick* and *Brown* to the facts of this case.

CONCLUSION

Wherefore, for the above and foregoing reasons, the Petitioner prays that a Writ of Certiorari be issued to the United States Court of Appeals for the Seventh Circuit in this case.

Respectfully submitted,

EDWARD J. CALIHAN, JR.,
Attorney for Petitioner